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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

15 WESTERN WATERSHEDS PROJECT and ) 3:11-cv-00053-HDM-VPC  
16 CENTER FOR BIOLOGICAL DIVERSITY, )  
17 Plaintiffs, )  
18 vs. ) ORDER  
19 BUREAU OF LAND MANAGEMENT, )  
20 Defendant, and )  
21 SPRING VALLEY WIND LLC, )  
22 Defendant-Intervenor. )

23 Plaintiffs have filed a motion for injunction pending appeal  
24 under Federal Rule of Civil Procedure 62(c) and Federal Rule of  
25 Appellate Procedure 8(a)(1). (Docket No. 66-1) Defendants Bureau of  
26 Land Management (BLM) and Spring Valley Wind, LLC have opposed the  
27 motion. (Docket Nos. 73, 74) Plaintiffs have waived their reply  
28 brief. (Docket No. 77)

## 1 || I. Standard of Review

2 Pursuant to Fed. R. Civ. P. 62(c), the court may suspend, modify,  
3 restore, or grant an injunction while an appeal is pending. Fed. R.  
4 App. P. 8(a)(1) requires a motion to stay be filed in the district  
5 court before a party may seek relief from the Ninth Circuit. *Lands*  
6 *Council v. Packard*, 391 F. Supp. 2d 869, 870 (D. Idaho 2005).

7 It appears the Ninth Circuit currently recognizes two standards  
8 for injunctions pending appeal. The more stringent standard requires  
9 analyzing: (1) whether plaintiffs established a strong likelihood of  
10 success on the merits; (2) whether the balance of irreparable harm  
11 favors plaintiffs; and (3) whether the public interest favors granting  
12 the injunction. *Warm Springs Dam Task Force v. Gribble*, 565 F.2d 549,  
13 551 (9th Cir. 1977). The less stringent standard employs a showing  
14 similar to that required for a preliminary injunction under Fed. R.  
15 Civ. P. 65. *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983).  
16 This standard requires plaintiffs demonstrate "either a likelihood of  
17 success on the merits and the possibility of irreparable injury, or  
18 that serious questions going to the merits were raised and the balance  
19 of hardships tips sharply in [plaintiffs'] favor." *Sega Enterprises,  
20 Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1517 (9th Cir. 1989).<sup>1</sup>

23       <sup>1</sup> The Ninth Circuit reviews a district court's decision denying a request for  
24 a preliminary injunction for abuse of discretion. *Earth Island Inst. v. Carlton*,  
25 626 F.3d 462, 468 (9th Cir. 2010). "A district court abuses its discretion if in  
26 denying [such] a request ... it bases its decision on an erroneous legal standard  
27 or clearly erroneous findings of fact." *Id.* Thus, the Ninth Circuit's review is  
28 "limited and deferential." *Id.*

1     **II. Discussion**

2         On March 28, 2011, this court entered orders denying plaintiffs'  
3 motion for a temporary restraining order and/or a preliminary  
4 injunction (Docket No. 24) and granting defendant Spring Valley Wind's  
5 motion to strike the extra-record declaration of Merlin D. Tuttle  
6 (Docket No. 50). (Docket Nos. 62, 61) The court held that plaintiffs  
7 had failed to show a likelihood of success on the merits, the  
8 possibility of irreparable harm, and that the balance of equities or  
9 public interest tipped in their favor. (Docket No. 62) The court also  
10 held that the Tuttle Declaration should be stricken from the record  
11 because it did not fall within any of the four exceptions under which  
12 the court may consider extra-record evidence. (Docket No. 61)

13         In bringing their motion for an injunction pending appeal (Docket  
14 No. 66-1), plaintiffs have not raised any new issues beyond those  
15 already presented to and adjudicated by this court on plaintiffs'  
16 application for injunctive relief (Docket No. 24). Because the court  
17 has already reviewed and rejected these arguments when it issued its  
18 order on the motion for a temporary restraining order and/or a  
19 preliminary injunction (Docket No. 62) and its order striking the  
20 Tuttle Declaration (Docket No. 61), it is unnecessary to revisit those  
21 same issues in depth. *See Lands Council*, 391 F. Supp. 2d at 871.

22         In reviewing its decision, the arguments of the parties, and the  
23 administrative record, the court finds and concludes as follows:

24         **A. Success on the Merits**

25         NEPA requires the preparation of an environmental impact  
26 statement (EIS) when an agency's actions will significantly affect the  
27 quality of the environment. 42 U.S.C. § 4332(2)(c). If in preparing  
28 an environmental assessment, the agency determines that the action

1 will have no significant impact, an EIS is not required. 40 C.F.R.  
2 § 1508.9(a). A decision to forego an EIS may be justified by the  
3 adoption of mitigation measures to offset potential environmental  
4 impacts. *National Parks & Conservation Assoc. v. Babbitt*, 241 F.3d  
5 722, 733-34 (9th Cir. 2001). If “significant measures are taken to  
6 ‘mitigate the project’s effects, they need not completely compensate  
7 for adverse environmental impacts.’” *Wetlands Action Network v.*  
8 *United States Army Corps of Eng’rs*, 22 F.3d 1105, 1121 (9th Cir.  
9 2000).

10                   1. *Impacts on Sage Grouse and Bats*

11                   The sage grouse population will not be significantly impacted by  
12 project activities in this case. Present range fragmentation and low  
13 quality sage-brush within the project’s boundaries already make the  
14 area unappealing habitat to local sage grouse. The closest lek is 1.5  
15 miles from the project site, is separated from the site by State  
16 Highway 893, and averages only three birds per year. (EA 59)  
17 Telemetry data for the area also confirms that there is no sage grouse  
18 activity within the project’s boundaries. *Id.* Further, the EA  
19 determined that construction would temporarily disturb only 3.8  
20 percent of the total habitat and permanently disturb only 1.1 percent  
21 of the total habitat. (EA 105-106) Mitigation measures such as funds  
22 for sage-brush enhancement, anti-perching devices to ward off  
23 predators, and limiting project activities during sage grouse mating  
24 seasons and near active leks will significantly reduce any potential  
25 impact of the project on the sage grouse.

26                   Nor will the Brazilian free-tailed bat population be  
27 significantly impacted by project activities. The project area is not  
28 a permanent roosting site for the bats. (EA 62) The closest bat cave

1 is the Rose Guano Cave located four miles east of the project site.  
2 (EA 61) That cave is only a seasonal migratory stop-over for the bats  
3 two months out of the year. *Id.* During their fall migration, the bats  
4 remain at the cave for only four days. *Id.* While at the cave, the  
5 bats' nightly foraging pattern takes them to high altitudes away from  
6 the project site. (EA 61-62)

7 In addition, the BLM undertook a comprehensive review of  
8 available scientific reports regarding the bats' vulnerability to wind  
9 turbine mortality through barotrauma or collision while compiling the  
10 EA. (PAR 96, 109, 1546, 1222, 1229, 1234, 1237-1239) The BLM also  
11 studied bat mortality rates from 11 wind energy facility studies that  
12 focused on facility and habitat sites similar to Spring Valley. (EA  
13 app. F, at 24) Based on the data presented and potential concerns  
14 raised in these studies, the BLM properly developed a detailed process  
15 for addressing potential impacts on bats. That process is set forth  
16 in detail in the EA, particularly in the Avian and Bat Protection Plan  
17 (ABPP). *Id.* at 14-31. It includes mitigation measures such as a  
18 Technical Advisory Committee of experts on-sight to monitor bat  
19 mortality levels, a radar detection system to monitor bat flight  
20 patterns and foraging habits, and turbine speed curtailments and shut  
21 downs to be utilized during periods of high bat movement in the area.  
22 Curtailment initially will be utilized during the "highest use periods  
23 of August 1 through September 31, from sunset to 4 hours after  
24 sunset." *Id.* at 17. The proposed adaptive management process governs  
25 the implementation of up to five turbine curtailment mitigation phases  
26 if the designated bat mortality threshold is met. *Id.* at 22-23. These  
27 phases contemplate up to 1,080 hours of cut-in speed curtailment and  
28 turbine shutdowns for up to 37,500 hours. *Id.* at 25. These measures

1 have been shown to reduce bat mortality by 53 to 87 percent. (EA 98)  
2 Thus, if these mitigation measures are implemented, the project's  
3 impacts on bats will not be significant. In addition, the predicted  
4 short-term disturbance during construction of vegetation in habitat  
5 that *may* provide foraging area to bats is 336.9 acres or 3.9 percent  
6 of the total available foraging area within the project boundaries.  
7 (EA 96) The long-term disturbance would include only 111.1 acres of  
8 habitat that *may* provide foraging area to bats and represents only 1.3  
9 percent of the project area. *Id.*

10 The BLM's decision to forego issuing an EIS is justified by the  
11 adoption of significant mitigation measures to offset potential  
12 environmental impacts. *Babbitt*, 241 F.3d at 733-34. These measures are  
13 supported by analytical data referenced in the administrative record  
14 and they adequately buffer against any potential negative impacts.  
15 Mitigation measures need not "completely compensate for adverse  
16 environmental impacts." *Wetlands Action Network*, 222 F.3d at 1121.  
17 Further, NEPA specifically allows agencies to utilize adaptive  
18 management plans that, like the ABPP in this case, monitor the real  
19 environmental effects of a project and allow the BLM to adapt its  
20 mitigation measures in response to the trends observed. See *Theodore*  
21 *Roosevelt Conserv. P'ship v. Salazar*, 616 F.3d 497, 517 (D.C. Cir.  
22 2010); *Friends of the Payette v. Horseshoe Bend Hydroelectric Co.*, 988  
23 F.2d 989, 993 (9th Cir. 1993). The BLM did not abuse its discretion  
24 or act arbitrarily or capriciously in preparing and relying on the EA.

25 *2. Tiering*

26 The BLM did not abuse its discretion in relying on the Wind PEIS.  
27 "Tiering, or avoiding detailed discussion by referring to another  
28 document containing the required discussion, is expressly permitted"

1 and encouraged under NEPA, so long as the tiered-to document has been  
2 subject to NEPA review. 40 C.F.R. § 1502.02. Any new issues that  
3 developed after the Wind PEIS was published were addressed in detail  
4 in the final EA. The EA specifically supplements the Wind PEIS with  
5 site specific data on bats and sage grouse. (EA 52-53, 58-63, 96-98,  
6 101-102, 105-111, 151-153, 165, 167) The EA considered bat collision  
7 with turbines, barotrauma, bat flight patterns and height, the Fish  
8 and Wildlife Service's decision to list sage grouse as "warranted" for  
9 the endangered species list, and telemetry data concerning active and  
10 inactive leks in the project area. (EA 97, 108-109, 58-59) The BLM  
11 also considered the mitigation measures proposed by the Wind PEIS and  
12 implemented the ones most suited for the project site. (EA 160-173)  
13 An EA need not consider all mitigation measures proposed in a PEIS.  
14 Measures should be evaluated objectively and on a site specific basis  
15 before being implemented. (Wind PEIS 5-1) Tiering the EA to the Wind  
16 PEIS was proper.

17                   3. *Cumulative Impacts*

18                   The EA also considered the cumulative impacts of the project on  
19 wildlife resources. 40 C.F.R. § 1508.27(b)(7). The EA's discussion  
20 of cumulative impacts includes a detailed table that discusses past  
21 actions, present actions and future actions that may cumulatively  
22 impact the environment. (EA 148-151) These include other impacts to  
23 the environment such as ranching and grazing. *Id.* The EA also notes  
24 that adjustments may need to be made to maintain habitat quality of  
25 other species in the area, such as utilizing existing fencing and  
26 vegetation treatment. *Id.* The EA also identified five reasonably  
27 foreseeable actions that could contribute to cumulative impacts. (EA  
28 151) They are: (1) the Southern Nevada Water Authority Groundwater

1 Development Project; (2) the NextEra Wind Energy Development; (3) the  
2 Ely Wind (Antelope Range) project; (4) the Wilson Creek Wind project;  
3 and (5) continued grazing in the area. *Id.* Although these projects  
4 and activities will incrementally increase the cumulative impacts of  
5 the Spring Valley Wind project, after careful consideration of all the  
6 factors, the BLM determined that when combined with the significant  
7 mitigation measures outlined in the ABPP, the result would be only a  
8 small percentage change in effects. *Id.* Moreover, the EA properly  
9 tiers to the Wind PEIS and notes that "direct, indirect and cumulative  
10 impacts" are "quantified where possible" in its individual  
11 "discussions of impacts on each affected source." (EA 148) Indeed,  
12 impacts on bats and sage-grouse are addressed in more detail in other  
13 sections of the EA. (EA 81-122, 96-98, 101-102, 108-110, app. F) By  
14 considering other foreseeable actions in the region, tiering to the  
15 Wind PEIS, incorporating new scientific data into its final decision,  
16 and articulating substantial mitigation measures, the BLM sufficiently  
17 considered the cumulative impacts of the project. Under these  
18 circumstances it is proper to defer to the BLM's expert conclusion.

19                  4. *Tuttle Declaration*

20                  Courts reviewing an agency decision are limited to the  
21 administrative record. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729,  
22 743-44 (1985). This means that "[j]udicial review of an agency  
23 decision typically focuses on the administrative record in existence  
24 at the time of the decision and does not encompass any part of the  
25 record that is made initially in the reviewing court." *Lands Council  
26 v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005). The evidence presented  
27 in the Tuttle Declaration attacks the adequacy of the BLM's review of  
28 bat mortality risks related to wind energy facilities and the

1 sufficiency of its mitigation measures. The Tuttle Declaration relies  
2 heavily on data from a Texas Gulf Wind Facility study. The data from  
3 that study was finalized in January 2011 and was not before the BLM  
4 when it issued its decision in this case in October 2010. Thus, to  
5 be considered by the court, the Tuttle Declaration must fall into at  
6 least one of four limited exceptions that permit a court to consider  
7 extra-record evidence: (1) when an agency has failed to consider all  
8 relevant factors, (2) when an agency has relied on documents not in  
9 the record, (3) when the evidence is required to explain highly  
10 technical subject matter, or (4) when an agency has acted in bad  
11 faith. *Id.*

12 Plaintiffs contend the court should have considered the Tuttle  
13 Declaration under two of the four exceptions - (1) the consideration  
14 of relevant factors and (2) the explanation of technical subject  
15 matter. However, the declaration does not fall into either of these  
16 exceptions. *Id.* First, the admission of extra-record evidence is not  
17 necessary to determine "whether the agency has considered all relevant  
18 factors and has explained its decision" in this case. *Id.* The  
19 administrative record indicates that the BLM reviewed 11 wind projects  
20 in the western U.S. with habitats similar to Spring Valley. (EA app.  
21 F, at 24) Based on the bat mortality rates determined in these  
22 studies, the BLM concluded that the bat mortality threshold for the  
23 Spring Valley Wind project would be 2.56 bats per turbine per year  
24 after taking into consideration the extensive mitigation measures to  
25 be implemented to ensure this threshold is not exceeded. *Id.* One of  
26 the studies considered is the Judith Gap study in Montana, which  
27 presents a bat mortality rate approximately five times higher than  
28 that proposed in this case and similar to that indicated in the Texas

1 Gulf Wind data. *Id.* The administrative record also includes three  
2 published bat studies that acknowledge bat vulnerability to wind  
3 turbine mortality, either through barotrauma or collision. See e.g.  
4 Baerwald, et al, "Barotrauma is a Significant Cause of Bat Fatalities  
5 at Wind Turbines," (published 1/1/2008); Arnett, et al, "Effectiveness  
6 of Changing Wind Turbine Cut-in Speed to Reduce Bat Fatalities at Wind  
7 Facilities," 2008 Annual Report (published 4/1/2009); Baerwald, et al,  
8 "A Large-Scale Mitigation Experiment to Reduce Bat Fatalities at Wind  
9 Energy Facilities," (published 2009). Thus, the BLM reviewed numerous  
10 wind energy and bat related studies similar to the Texas Gulf Wind  
11 study and considered many factors relating to the risk of bat  
12 mortality at the Spring Valley Wind Facility.

13 Second, the evidence in the Tuttle Declaration is not necessary  
14 to explain technical terms or complex subject matter. *Id.* The Tuttle  
15 Declaration does not consider any new issues or scientific evidence  
16 not already raised or addressed by the BLM and included in the  
17 administrative record and admissible exhibits already presented by the  
18 parties in this case.

19 The Tuttle Declaration was not offered to fill holes in the BLM's  
20 analysis or explain complex subject matter. It was offered as a  
21 critique of the BLM's decision and to dispute the merits of that  
22 decision. Parties may not use "post-decision information as a new  
23 rationalization either for sustaining or attacking the Agency's  
24 decision." *Ass'n of Pac. Fisheries v. EPA*, 615 F.2d 794, 811-12 (9th  
25 Cir. 1980). It was not necessary for the BLM to consider the Tuttle  
26 Declaration before making its finding of no significant impact. Any  
27 questions raised regarding bat mortality levels at the project site  
28 were considered in depth by the BLM when it reviewed 11 bat mortality

1 studies at wind energy facilities similar to the project site at issue  
2 in this case. In addition, the BLM went to great lengths to tailor  
3 mitigation measures to the project to reduce impacts on bats.  
4 Accordingly, the plaintiffs have failed to show that the court abused  
5 its discretion in striking the Tuttle Declaration.<sup>2</sup> *Lands Council*, 391  
6 F. Supp. 2d at 870-871; *Karuk Tribe of California v. U.S. Forest*  
7 *Service*, 2011 WL 1312564 (9th Cir. April 7, 2011). Even if the court  
8 had admitted the Tuttle Declaration, the court would have concluded  
9 that such evidence was insufficient to warrant the issuance of a  
10 preliminary injunction. Plaintiffs have failed to meet their burden  
11 of demonstrating success on the merits.

12 B. Irreparable Harm

13 For the reasons set forth above, irreparable injury to the sage  
14 grouse population seems unlikely. Habitat fragmentation does not pose  
15 a substantial risk in this case and there are no active leks within  
16 the project area. Indeed, new telemetry data collected immediately  
17 prior to beginning construction on this project showed that there was  
18 no sage grouse activity in the two leks closest to the project site.  
19 (D'Aversa 3d Decl. ¶ 6) The closest distance to the project at which  
20 a sage grouse was observed was 5 miles. *Id.* In addition, although the  
21 greater sage grouse is a "candidate species" for the endangered  
22 species list, it has not been prioritized. (EA 58) In the fall of  
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24 <sup>2</sup> The court would note that this declaration was filed by the plaintiffs  
25 without first attempting to receive leave of court to do so. Nor did the plaintiffs  
26 request that the BLM re-open the administrative proceedings to consider this extra-  
27 record Tuttle Declaration discussing the new Texas Wind Facility data prior to  
28 filing it with the court.

1 2010, the Nevada Department of Wildlife allowed hunting of sage grouse  
2 throughout most of Nevada, including Spring Valley. (Harrison Decl.  
3 ¶ 4) Given the poor quality of sagebrush habitat within the project  
4 boundaries, the lack of sage grouse use of the project area, the BLM's  
5 mitigation measures, and Spring Valley Wind's commitment to enhance  
6 existing habitat, it is unlikely the sage grouse population will  
7 suffer irreparable harm if the injunction is denied.

8 In addition, the initial stages of development of the project  
9 pose no threat to the bats. Any risk to the bat population arises  
10 from operational wind turbines. The wind turbines will not be  
11 operational until at least April 1, 2012. (Inlow Decl. ¶ 16) There  
12 is no risk of irreparable harm to the bats before a decision on the  
13 merits of this case is determined. Even once the wind turbines are  
14 operational, the data and mitigation measures presented by the BLM in  
15 the EA indicate that the bat population will not face irreparable or  
16 significant harm. Notably, the free-tailed bat is one of the most  
17 abundant bat populations in the United States and over one million  
18 bats stop-over in the Great Basin area each year. (EA 52) "To equate  
19 the death of a small percentage of a reasonably abundant ... species  
20 with irreparable injury ... is to ignore the plain meaning of the  
21 word." *Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir.  
22 1975).

23 Finally, plaintiffs have not demonstrated that allowing the  
24 project to proceed at this stage would hinder, in any way, the court's  
25 ability to prevent irreparable injury at the point it becomes  
26 imminent. Bureaucratic momentum does not create immediate, irreparable  
27 injury. Future injury or conjectural hypothetical injury months from  
28 now cannot form the basis of an injunction at this stage. See

1 *Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 472 (9th  
2 Cir. 1984); *Park Vill. Apt. Tenants Ass'n v. Mortimer Howard Trust*,  
3 2001 U.S. App. LEXIS 3683, \*29 (9th Cir. Feb. 25, 2011).

4 C. Balance of Hardships and Interests

5 The environmental interests are outweighed by other interests in  
6 this case. Delaying this project would harm federal renewable energy  
7 goals and delay Nevada's economic recovery. As the plaintiffs  
8 concede, Congress and the President have clearly articulated that  
9 clean energy is a necessary part of America's future and it is  
10 important to Nevada's economic and clean energy goals. In this case,  
11 this was a very important factor to consider, particularly in light  
12 of the time constraints on the availability of federal funding, in  
13 deciding whether to issue an injunction. The project would power over  
14 40,000 Nevada homes, provide millions of dollars in property tax  
15 revenue, and generate over 220 new jobs with priority to Nevada  
16 residents and over \$20 million in wages. (D'Aversa 2d Decl. ¶ 3;  
17 Hardie Decl. ¶ 16) An injunction would likely prevent Spring Valley  
18 Wind from obtaining federal funding and tax credits. *Id.* ¶ 10. Without  
19 these financial incentives, it is likely the project would not be  
20 built. *Id.* If the project is not built, Nevada will not be able to  
21 take advantage of the much needed economic and renewable energy  
22 benefits the project will bring to this state. With a state  
23 unemployment rate of 14.9 percent, compelling evidence has been  
24 presented that Nevada cannot afford to lose these benefits. (D'Aversa  
25 2d Decl. ¶ 3)

26 In contrast, for the reasons set forth above, any disturbance of  
27 the sage-grouse and bat habitats will be minimal and will not  
28 significantly impact the environment. While the public also has a

1 strong interest in preserving the environment and protecting species  
2 like the free-tailed bats and greater sage-grouse, that interest in  
3 this case, at this stage in the proceedings, is outweighed by the  
4 other public interests articulated above.

5 As a final note, it is important to consider that the Spring  
6 Valley Wind Project is a tiered renewable energy development. The  
7 activities presently being litigated concern only the first phase of  
8 the development -- that is, one wind farm with only 60 to 70 wind  
9 turbines, not the 1,000 turbines plaintiffs claim will be built.  
10 Before expanding this renewable energy development the BLM would,  
11 under NEPA, be required to conduct a new, supplemental environmental  
12 assessment before approving construction. 43 C.F.R. §§ 1610, 2807.20;  
13 43 U.S.C. § 1761; <http://www.blm.gov/ca/st/en/info/nepa/ibca9874.html>.<sup>3</sup>  
14 Thus, if the scope of the project is altered, a re-evaluation of the  
15 BLM's decision is required. *Id.* At that time, the BLM will have site-  
16 specific information relating to the mitigation measures that will be  
17 of critical importance in making an assessment as to whether a new or  
18 supplemental EA or an EIS will be required before the scope of the  
19 project is altered.

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21       <sup>3</sup> Additional NEPA analysis, that is, a new or supplemental EA or EIS, is  
22 required when: (1) the proposed action has not been addressed previously, is in a  
23 new location, or involves a significant modification to an existing action; (2) the  
24 proposed action has been considered in a programmatic EIS or EA but a site-specific  
25 analysis is needed; or (3) there is significant new information, a major new issue,  
26 or a substantial change in circumstances relating to potential environmental effects  
27 of the proposed action.

28

### 1 || III. Conclusion

2 The court holds that plaintiffs have failed to demonstrate a  
3 likelihood of success on the merits, applying either the *Lopez*  
4 standard or the *Warm Springs* standard. In addition, plaintiffs have  
5 failed to show that the environment will be adversely affected or will  
6 suffer irreparable harm if an injunction is not issued, or that  
7 serious questions going to the merits were raised such that the  
8 balance of hardships and interests tips in their favor. Finally,  
9 plaintiffs have failed to establish that the court's decision to  
10 strike the Tuttle Declaration was an abuse of the court's discretion.  
11 Accordingly, the plaintiffs' motion for an injunction pending appeal  
12 (Docket No. 66-1) is DENIED.

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14 IT IS SO ORDERED.

15 DATED: This 28th day of April, 2011.

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Howard D McKibben  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT JUDGE

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